STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 7, 2006
V DESHAWN WHITMAN, Defendant-Appellant.	No. 256223 Wayne Circuit Court LC No. 03-009701

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
V ASKIA HILL, Defendant-Appellant.	No. 256497 Wayne Circuit Court LC No. 03-013080-01

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

In these consolidated appeals, defendant Deshawn Whitman appeals as of right his convictions of one count of assault with intent to commit murder, MCL 750.83, carjacking, MCL 750.529a; felon in possession of a firearm, MCL 750.224f; and felony firearm, MCL 750.227b. Defendant Whitman was sentenced as a habitual offender, 2d. Defendant Askia Hill appeals as of right his convictions of one count of assault with intent to commit murder, MCL 750.83, carjacking, MCL 750.529a; felon in possession of a firearm, MCL 750.224f; and felony firearm, MCL 750.227b. Defendant Hill was sentenced as a habitual offender, 3d. We affirm both defendants' convictions.

Defendants were tried jointly[1], as a result of two shootings on April 6, 2000. Relating to the murder charges, Erwin Wilson was shot and killed in front of 4171 Drexel, in Detroit. The

[1] Marcus Taylor was tried with defendants, and was acquitted of all charges (relating to both (continued…)

assault with intent to murder and carjacking charges arose out of another shooting, in which Jermaine Davenport, Wilson's cousin, was shot in the neck and his vehicle, a Yukon, was taken. Both defendants were acquitted of first-degree murder and the lesser offense of second-degree murder.

The prosecution's theory was that Hill, Whitman, Taylor and a fourth man, were in a black SUV around 10:00 p.m. on April 6, 2000, and shot and killed Erwin Wilson, a street-level drug dealer, in front of 4171 Drexel Street. A few minutes later, the black SUV approached Jermaine Davenport, Wilson's cousin, who was in another SUV parked on the street talking to fourteen-year-old Unique Webster. Someone from the black SUV shot at Davenport and the SUV and chased him, until Davenport's SUV crashed into a parked car and stopped. Davenport got out of his SUV and was shot at by Whitman and the others. Davenport sustained a gunshot wound to the neck, and Davenport's SUV was taken by several of the perpetrators. Davenport walked to the house on Drexel, saw Wilson lying in the street, and saw Roosevelt Walker, a friend of Davenport's with whom Davenport had been earlier. Davenport did not name any perpetrators until well after the shootings. In May 2000, Davenport was charged with Wilson's murder, but the charges were later dropped.

Defendant Whitman's defense theory was that Jermaine Davenport argued with Wilson on the evening in question and was in the SUV from which the shot that killed Wilson was fired. Defendant Hill's defense was that he was not present at either shooting incident, and that Jermaine Davenport, who was involved in drug-dealing along with Wilson, had every reason to lie regarding this case.

I

Defendant Whitman first asserts that this case must be remanded for resentencing, on the basis that the sentencing transcript dated June 8, 2004 does not "record the [trial court's] sentence of defendant nor its reasons for the sentence." Defendant also asserts that the record does not establish that defendant was allowed the right to allocate. We disagree that remand is warranted.

The trial court stated at the outset of the June 8, 2004 sentencing hearing that "the only remaining issue was jail credit," and in fact, the transcript reflects that only jail credit was discussed at that hearing. This supports the prosecution's position that the June 8 hearing was a continuation of a prior hearing. In fact, the Wayne Circuit Court's internal docketing system reflects that sentencing was initially scheduled for May 25, 2004, and was adjourned at defendant's request, and that a June 2, 2004 hearing was adjourned by court order. Defendant did not expressly order the transcripts of proceedings occurring on May 25 or June 2,[2] and he does not affirmatively assert either that no proceedings occurred on those days or that defendant was not sentenced and permitted to allocute on May 25 or June 2. Instead, defendant argues that

(…continued)

shootings).

[2] The Claim of Appeal and order appointing counsel reflects that only the transcript of the proceeding occurring on June 8 was ordered.

the record as presented to this Court does not reflect his allocution, his sentence, and the articulated reasons for the sentence. Under these circumstances, we conclude that defendant has not complied with MCR 7.210(B)(1)(a) and may not assert error. *People v Wilson*, 196 Mich App 604, 615; 493 NW2d 471 (1992).

II

Defendant Whitman next contends that Roosevelt Walker testified during direct examination that Jermaine Davenport told Walker that defendant Whitman shot Davenport. On cross-examination, Walker retreated from this testimony, indicating that Davenport told him so sometime within a year of the incident. Defendant argues that because the testimony had been stricken from the record at the preliminary examination on hearsay grounds, the trial court did not allow defense counsel to cross-examine Walker regarding inconsistent statements provided during the preliminary examination, where Walker denied that Davenport told him (Walker) who shot him (Davenport). Defendant asserts that this was crucial because it went to Davenport's identification of defendant as his assailant, and thus a new trial is warranted to allow Walker to be confronted with his preliminary examination testimony under MRE 801(d)(1).

This Court reviews a preserved challenge to a trial court's evidentiary ruling for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). To justify reversal of his convictions, a defendant must show that it is more probable than not that the error was outcome determinative. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001); *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Error is presumed harmless and the defendant bears the burden of showing that the error resulted in a miscarriage of justice. *People v Albers*, 258 Mich 578, 590; 672 NW2d 336 (2003).

We conclude that error, if any, was harmless. At trial, codefendant Taylor called the court reporter present at the preliminary examination to testify regarding Walker's statement. The jury heard Walker's prior statement at the preliminary examination, i.e., that Davenport did not tell him (Walker) who had shot him until sometime within a year of the incident. When the court reporter testified that she had no independent recollection of Walker's statement and that she had had to refresh her memory by reading the transcript, the trial court struck the testimony. However, under cross-examination at trial, Walker many times made inconsistent statements regarding when Davenport told Walker that "Shawn" had shot him. Walker testified at one point that the first time he mentioned Davenport's statement was at the instant trial. Under these circumstances, evidence of an additional inconsistent statement on the same topic would not have altered the jury's credibility determination. We conclude that no miscarriage of justice resulted from the trial court's precluding defendant from impeaching Walker with preliminary examination testimony that had been stricken. *Albers, supra* at 590.

III

Defendant next contends that his conviction of assault with intent to commit murder was supported only by the victim's (Davenport's) testimony, and Davenport's friend, Roosevelt Walker, that both Davenport and Walker gave weak and inconsistent testimony, and that his conviction is against the great weight of the evidence, yet defendant's trial counsel did not file a motion for new trial. Defendant maintains that trial counsel's failure to do so constituted ineffective assistance of counsel.

To establish a claim of ineffective assistance, defendant must show that counsel's representation fell below an objective standard of reasonableness and so prejudiced him as to deny a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Defendant must demonstrate that a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *Id.*

We conclude that defendant did not establish that his trial counsel was ineffective for failing to move for a new trial. The prosecution is correct that trial counsel's failure to file such a motion did not preclude appellate counsel from doing so. Appellate counsel had 56 days after the commencement of the time for filing defendant-appellant's brief to file a motion for new trial in the trial court. See MCR 6.431(A)(2), 7.208(B)(1). Further, motions for new trial "should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). In this case, given the victim's (Davenport's) testimony that defendant shot him, any motion for new trial filed by trial counsel would have been futile. Absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility for the constitutionally guaranteed jury determination thereof. *Lemmon, supra* at 642. "When testimony is in direct conflict and testimony supporting the verdict has been impeached, if 'it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,' the credibility of witnesses is for the jury." *Lemmon, supra* at 643-644.

We conclude that defendant has not shown that counsel was ineffective for failing to move for a new trial.

IV

Defendant Whitman next argues that the trial court abused its discretion in denying defendant's motion for directed verdict. Defendant maintains that his convictions are based solely on the unbelievable and inconsistent testimony of Jermaine Davenport and his friend, Roosevelt Walker, and that his own name (Whitman) did not become involved in the investigation until after Davenport was implicated in the homicide of Erwin Wilson. At no time before did Davenport identify defendant Whitman as the person who shot him in the neck. Defendant asserts that the number of inconsistencies in Davenport and Walker's testimony should have created a reasonable doubt in the jury's mind and ought to have been insufficient to convict Whitman of the charges.

We conclude that the trial court properly denied defendant's motion for a directed verdict. Despite the many inconsistencies in Davenport's testimony, a reasonable jury could believe Davenport and find that defendant and his accomplices shot Davenport and carjacked his SUV. The parties stipulated that defendant had been convicted of a specified felony for purposes of the felon in possession of a firearm and felony-firearm charges. Thus, viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented to support defendant's convictions.

We affirm defendant Whitman's convictions, but remand to the trial court for resentencing proceedings consistent with this opinion.

DEFENDANT HILL

V

Defendant Hill challenges the trial court's denial of his motion for severance, where the allegations in the two incidents involved different complaining witnesses, different locations, although near, and different times, although close in time.

This Court reviews a trial court's determination whether severance is mandatory de novo. *People v Abraham,* 256 Mich App 265, 271-272; 662 NW2d 836 (2003). Review of the trial court's decision to sever related offenses is for an abuse of discretion. *People v Duranseau,* 221 Mich App 204, 208; 561 NW2d 111 (1997).

The trial court noted in denying defendant's motion for severance:

> One could certainly argue from a review of the preliminary exam transcripts that the actions at issue, the offenses at issue as reflected in the information are a series of connected acts or acts constituting part of a single scheme or plan. Therefore, I certainly don't believe and I certainly know that severance is not mandated.
>
> The focus of Mr. Cripps' argument was requesting a . . . discretionary severance pursuant to 6.121(C) and(D) . . . .
>
> Looking at this case, thee [sic] issue is what is the best interest of assuring a fair trial to not only the defense, but also the prosecution. Looking at the parties resources, the potential for confusion or prejudice, the nature of the evidence, convenience of the witnesses, I certainly don't see that severance is necessary to avoid prejudice to any of the substantial rights of any of the defendants.
>
> Considering the facts which I just articulated, I think it's the best use of resources, to create the least potential for confusion or prejudice to the parties, to a jury's understanding of the nature of the case, nature of the evidence, convenience of the witnesses, to not have severance in this case.

MCR 6.120 provides:

> (A) Permissive Joinder. An information or indictment may charge a single defendant with any two or more offenses . . . .

MCR 6.121(D), JOINDER AND SEVERANCE; MULTIPLE DEFENDANTS, provides:

> (C) Right of Severance; Related Offenses. On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.
>
> (D) Discretionary Severance. On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the

> drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial.

The trial court did not err in concluding that severance was not mandatory. Two offenses are related if they are based on the same conduct or a series of connected acts. MCR 6.120(B). The prosecution maintains, and we agree, that Erwin Wilson's murder and the assault on Jermaine Davenport, Wilson's cousin, constitute "connected acts" under the court rule. Shortly before Wilson was shot, Davenport was parked in his SUV and saw a black SUV drive by, driven by defendant Whitman, with defendant Hill in the passenger seat and codefendant Marcus Taylor in the back seat. Davenport saw the black SUV stop in front of Unique Webster's house and heard gunshots. The black SUV drove away, but Davenport saw it about five minutes later, at which time he heard gunshots and his vehicle's rear window shattering. Davenport drove off, was pursued, and after crashing into a parked car, got out of his SUV and saw defendants Whitman and Hill and Taylor next to the black SUV. All the men shot at Davenport, he was struck in the neck, and the men drove away in his SUV and the black SUV. The acts happened within minutes, in proximity to each other, and the shooting of Wilson may have been the motive to Davenport's shooting. We conclude that the trial court did not err in concluding severance was not mandatory. *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977).

Nor was the trial court's denial of defendant's request for severance an abuse of discretion. The trial court set forth its reasons for denying severance, see quoted excerpt, *supra*, and the record supports its determination. Had the court granted severance, a second trial would have been necessary, in which the same witnesses would have testified. No risk of confusion of the issues existed because the case was not complex, and there was a close connection between the shootings. We conclude the trial court did not abuse its discretion by denying defendant Hill's motion for severance. *People v Miller*, 165 Mich App 32, 46; 418 NW2d 668 (1987), remanded for reconsideration on other grounds 434 Mich 915 (1990).

VI

Defendant Hill asserts that he was denied a fair trial and his constitutional rights to present a defense and to due process under the Sixth and Fourteenth Amendments through the trial court's comments and interjections, and the limitations on cross-examination, such that the defense was belittled and unfairly limited in its presentation. Defendant Hill maintains that his counsel was improperly limited from fully testing Unique Webster's credibility, and the court's ruling deprived Hill from effectively defending against the charges. In addition, defendant Hill contends that the trial court's comments and questions interrupted defense counsel's ability to present a defense for Hill, belittled counsel before the jury, and operated to prejudice defendant Hill.

This Court reviews for an abuse of discretion a trial court's determination to limit cross-examination and other rulings involving its control of trial proceedings. *People v Sexton*, 250 Mich App 211, 221; 646 NW2d 875 (2002). Under MRE 611(a), a trial court has broad discretion to control trial proceedings, and in doing so, may impose time limits on cross-examination. *People v Thompson*, 193 Mich App 58, 62; 483 NW2d 428 (1992). This Court in *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), reversed the defendant's conviction of first-degree criminal sexual conduct, concluding that the trial court had improperly

limited the defense from effectively cross-examining the complaining witness with comments made to her therapist on the basis of the statutory psychologist-patient privilege:

> A primary interest secured by the Confrontation Clause is the right of cross-examination. *Delaware v Van Arsdall,* 475 US 673, 678; 106 S Ct 1431; 89 L Ed 2d 674 (1986); *Douglas v Alabama,* 380 US 415, 418; 85 S Ct 1074; 13 L Ed 2d 934 (1965). The right of cross-examination is not without limit; neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject. *People v Hackett,* 421 Mich 338, 347; 365 NW2d 120 (1984); *Dutton v Evans,* 400 US 74; 91 S Ct 210; 27 L Ed 2d 213 (1970). The right of cross-examination does not include a right to cross-examine on irrelevant issues and may bow to accommodate other legitimate interests of the trial process or of society. *United States v Nixon,* 418 US 683; 94 S Ct 3090; 41 L Ed 2d 1039 (1974); *Mancusi v Stubbs,* 408 US 204; 92 S Ct 2308; 33 L Ed 2d 293 (1972); *People v Arenda,* 416 Mich 1, 8; 330 NW2d 814 (1982). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. *Van Arsdall, supra,* p 679. Defendants are, however, guaranteed a reasonable opportunity to test the truth of a witness' testimony. *Hackett, supra.*

"A constitutional error is harmless if '[it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *People v Shepherd,* 472 Mich 343, 347; 697 NW2d 144 (2005), quoting *People v Mass,* 464 Mich 615, 640 n 29; 628 NW2d 540 (2001), quoting *Neder v United States,* 527 US 1, 19; 119 S Ct 1827; 144 L Ed 2d 35 (1999).

A

> The crux of defendant Hill's Confrontation Clause argument is:
>
> The Trial Court determined that as one of the three defense attorneys (each of whom obviously represented individual client-defendants) was thorough, the remaining two attorneys could be limited. Mr. Hill's counsel pointed-out after the cross-examination of Unique Webster, a res gestae witness to the murder, that there remained six or seven additional areas he wanted to question Miss Webster about; the Court asked counsel to explain the six or seven, and, after counsel proceeded, acknowledged that counsel had described eight or nine areas. For example, counsel wanted to follow-up on the discrepancies in Miss Webster's trial testimony about hearing tires squealing, in contrast to her previous testimony about hearing nothing; to follow-up on the testimony about false police reports and lack of intimidation, the existence or non-existence of other vehicles on the street (i.e., a white Dodge Dynasty), the possibility that Walker and Davenport were, or appeared to be stalking Wilson, the nature of the relationship with Wilson, and other details, that would have served to properly present her credibility to the jury for consideration. Her credibility was crucial to the case; not only was she present during the murder, and gave differing versions shortly after and a month after, of what exactly had happened, but she was also present when her brother Michael gave a statement incriminating Davenport as the murderer, and she signed the statement. She

had spoken with Davenport at the various pre-trial court hearings. Defense counsel was improperly limited from fully testing her credibility; the court's ruling deprived Mr. Hill from effectively defending against the charges.

The prosecution asserts, and we agree, that the record shows that the areas defendant Hill's counsel identifies above were covered by him at trial or by co-defendant Whitman's counsel. Hill's counsel cross-examined Unique Webster regarding whether she heard a car approach and drive away, and whether she heard screeching of tires, and he impeached her testimony in that regard. Hill's counsel also cross-examined Webster regarding her prior identification of Davenport.

Co-defendant Whitman's counsel cross-examined Webster regarding whether she saw Davenport's car and any cars she did not recognize. Whitman's counsel impeached Webster with her statement to the police, and questioned her regarding whether she saw Davenport drive on her street earlier that day. Whitman's counsel also impeached Webster with a prior statement indicating that she at times saw Walker riding with Davenport, and whether she had seen Walker on the street. Whitman's counsel cross-examined Webster regarding her relationship with Wilson, Wilson's drug-dealing activities, and her inconsistent statements regarding those issues. Whitman's counsel also impeached Webster with inconsistent statements she made about the shooting, Wilson's actions, and whether she saw a black truck.

We agree with the prosecution that Webster's inconsistent statements and biases were explored at length during trial. Impeachment of Unique Webster by defense counsel was rampant. We conclude that a reasonable jury would think very little of her credibility, and that further cross-examination could have done little to further diminish their view of her credibility. Thus, if there was error in limiting defendant Hill's counsel's cross-examination of Unique Webster, it was harmless because additional questioning would not have caused the jury to alter its determinations of her credibility and the weight to accord her testimony. *People v Mass*, 464 Mich 615, 640, n 29; 628 NW2d 540 (2001).

B

Defendant Hill's final challenge is to the trial court's remarks and interruptions. Whether a judge, through comments and questions improperly deviates from impartiality a reviewing court considers whether the questions and comments 'may well have unjustifiably aroused suspicion in the mind of the jury' as to a witness' credibility, . . . and whether partiality 'quite possibly could have influenced the jury to the detriment of defendant's case.'" *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992), citing *People v Sterling*, 154 Mich App 223; 397 NW2d 182 (1986).

The trial court instructed counsel on how to refresh Davenport's memory and impeach him with prior testimony and statements. When counsel would not follow that procedure, the trial court held a sidebar. The trial court ruled on the People's objections to counsel's questioning of Davenport, and held sidebars and hearings outside the jury's presence because defense counsel persisted in arguing after the trial court had ruled.

We conclude that defendant has failed to show that the trial court's comments and rulings suggested the court was biased in the prosecution's favor, nor is it likely that the court's remarks unduly influenced the jury such that defendant was denied a fair trial.

We affirm both defendants' convictions.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder